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No. 93-1483

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN E. HARRISON, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly remanded the case to allow the district court to determine whether Virginia's equitable estoppel doctrine tolled the statute of limitations in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 7 F.3d 396. The order of the district court (Pet. App. C1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1993. Petitions for rehearing were denied on December 21, 1993. Pet. App. B1. The petition for a writ of certiorari was filed on March 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the activities of petitioners connected with McLean Savings & Loan Association. On July 8, 1988, the Federal Savings & Loan Insurance Corporation (FSLIC) was appointed receiver of that institution. In connection with a sale of the institution from the receiver to a third party, FSLIC acquired potential claims of the institution against petitioners and various other parties. The Federal Deposit Insurance Corporation (FDIC) succeeded to those claims in its capacity as manager of the FSLIC Resolution Fund when FSLIC was abolished in 1989. See Pet. App. A4-A5 & nn.2-3; 12 U.S.C. 1821a(a) (Supp. IV 1992); FDIC C.A. Br. 13-14.

2. In late 1991, the FDIC filed a complaint against petitioners alleging that they had breached duties that they owed to the institution, which had caused the institution to suffer monetary losses. In particular, the complaint alleged that, among other things, the institution improperly made unsecured loans to an unprofitable financial service subsidiary without securing the required regulatory approvals, and that in 1986 the board of directors of the institution approved a dividend for shareholders even though the institution's financial position at that time made the dividend inappropriate. The complaint also alleged that the challenged misconduct contributed to the failure of the institution. See Pet. App. A4-A5.

Some of the defendants (petitioners, as well as Blair, Harn, and Light) filed motions for summary judgment contending that the complaint was barred by the statute of limitations. At a hearing on the motions, the district court stated its view that the FDIC's claims would be barred if the limitations period provided by state law had

expired before appointment of a federal receiver. Applying Virginia law, the court concluded that the claims were governed by Virginia's one-year statute of limitations for personal actions. Because the last act or omission challenged by the FDIC occurred in April of 1987, and because a federal receiver was not appointed until July of 1988, the court concluded that the claims were barred. The court rejected the FDIC's argument that the adverse domination doctrine tolled the state limitations period, stating that "[t]his in my view is not the type of adverse domination that was present in [other cases where the doctrine was applied]." May 1, 1992, Tr. 81-83; C.A. App. 113-115. After the hearing, the district court entered an order granting the motions and dismissing the moving parties as defendants. Pet. App. C1.[1]

3. The court of appeals affirmed with respect to the district court's conclusion that the federal adverse domination doctrine did not toll the statute of limitations. Pet. App. A6-A8.[2] The court then considered the applicable state-law standard, and concluded that Virginia law would toll the statute of limitations if "the directors concealed their wrongdoing * * * during the period after the last act of alleged misconduct until the FDIC became receiver." *Id.* at A13. Accordingly, the court of appeals concluded that the district court had erred in "rejecting outright" the possibility of tolling with respect to the claims against petitioners. *Id.* at A12. The court of appeals remanded the case to the

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[1] The district court subsequently granted similar motions by other parties. Pet. App. 20a-22a, 23a-26a, 28a-30a, 31a-33a, *FDIC* v. *Cocke*, No. 93-1485.

[2] On March 21, 1994, we filed a petition for a writ of certiorari challenging that conclusion. *FDIC* v. *Cocke*, No. 93-1485.

district court to give it an opportunity "to determine the extent to which equitable estoppel tolls Virginia's one-year statute of limitations." *Id.* at A13.

ARGUMENT

Petitioners argue (Pet. 8-16) that the court of appeals erred in remanding the claims against petitioners to allow the district court to consider whether the FDIC can allege facts sufficient to support equitable estoppel under the appropriate Virginia common-law standard. They claim that the FDIC did not properly allege such facts when the case was in the district court in the first instance, and that *Celotex Corporation* v. *Catrett*, 477 U.S. 317 (1986), accordingly requires summary judgment against the claim of equitable estoppel.

Petitioners' argument misapprehends the procedural posture of the case. The court of appeals did not hold that the filings submitted by the FDIC when the case was in the district court were adequate to withstand a motion for summary judgment by petitioners. Rather, the court of appeals simply concluded as a matter of judicial administration that the appropriate course in light of that court's detailed articulation of the applicable legal standard—which was not available to the parties or the district court in the first instance—was to remand the matter to the district court to give the parties an opportunity to present to that court their arguments regarding the propriety of summary judgment under the newly articulated standard. If the FDIC fails to present adequate support for that claim—satisfying Fed. R. Civ. P. 56 as interpreted by this Court in *Celotex*—it will be appropriate for the district court to grant summary judgment on that issue at that time.

Nothing in this Court's opinion in *Celotex* is inconsistent with the propriety of that course of action.

Celotex is a case about the quantum of support necessary to survive a motion for summary judgment. See 477 U.S. at 322 (holding that "Rule 56(c) mandates the entry of summary judgment * * * against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). The question at issue here, by contrast, is whether the FDIC is entitled to an opportunity to satisfy the *Celotex* standard in light of the legal principles articulated by the court of appeals. We submit that it is. Cf. *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949) (per curiam) (error for court of appeals to grant summary judgment "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court").

It is not surprising that the filings offered by the FDIC in the first instance did not in terms address the questions that are relevant under the intentional concealment standard articulated by the court of appeals. At the time of those filings, the FDIC did not agree, and the district court had not held, that the FDIC was required to establish intentional concealment in order to secure tolling under Virginia's equitable estoppel doctrine. In the district court the FDIC offered submissions that demonstrated the existence of genuine issues of fact that were material under the FDIC's understanding of the applicable legal standard.[3] Now that the court of appeals

[3] We do not agree with petitioners' assertion that the FDIC submitted no materials in support of its claims for estoppel. As petitioners themselves concede (Pet. 11 n.6), the FDIC consistently has argued that tolling was appropriate based on "a form of non-intentional equitable estoppel." Furthermore, contrary to petitioners' assertions (Pet. 10-12), the FDIC's opposition to petitioners' motion for summary judgment does appear in the record as part of a motion for reconsideration that the FDIC filed in the

has clarified what the standard is, and has rejected the district court's unduly narrow approach, it is entirely appropriate to allow the FDIC an opportunity to demonstrate that the facts in this case entitle it to estoppel under the standard articulated by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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district court on May 12, 1992 (Docket Entries 309 and 310, see C.A. App. 37).